

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2136

STATE OF CONNECTICUT, DEPARTMENT OF
INCOME MAINTENANCE,

Petitioner,

v.

MARGARET M. HECKLER, SECRETARY, and THE UNITED STATES
DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

REPLY BRIEF OF THE PETITIONER

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TABLE OF AUTHORITIES

	<u>Page</u>
CASES:	
Connecticut v. Schweiker, 557 F. Supp. 1077 (D. Conn. 1984)	2
Minnesota v. Heckler, 718 F.2d 852 (8th Cir. 1983)	2
Woe v. Matthews, 408 F. Supp. 419 (E.D.N.Y. 1976)	2

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Petitioner ("Connecticut") demonstrated in its Petition for a Writ of Certiorari that the federal courts are in direct conflict on the important issue of whether the limitation on Medicaid coverage for services in institutions for mental diseases ("IMD") extends generally to nursing homes known as intermediate care facilities ("ICFs"). Pet., pp. 7-9. The Courts of Appeals for the Second and Eighth Circuits were both required to address the identical issue in analyzing and interpreting the IMD limitation. Both courts were reviewing the same administrative action and the opposite results, reached upon consideration of the same relevant statutory prohibition and legislative history, will have a profound fiscal and programmatic impact nationwide.

Respondents' contention that there is no conflict among the federal courts and that any difference between the Second Circuit and Eighth Circuit courts regarding the scope of the IMD provision is of no importance is legally and logically unsupportable. Br. in Opp., pp. 10-11. Under the current state of the law, nursing homes (ICFs) caring for people with mental

conditions will be eligible for federal Medicaid funding if situated in the Eighth Circuit, while homes with precisely the same characteristics situated in Connecticut and the other Second Circuit states will be denied Medicaid funds. Homes situated in the other circuits remain in a state of uncertainty pending clarification of the conflict in the circuit court decisions to date. This is a real-life conflict in the law that cannot be brushed under the table as the respondents attempt to do.

Respondents' assertion that there is no significant difference in the analyses of the two circuit courts is unjustified. The Eighth Circuit court rejected DHHS' view that the definition of IMD turned essentially on the diagnoses of the residents of the facility and that there are no distinctions between mental hospitals and ICFs for IMD purposes. The court concluded that whether a facility is an IMD depends upon the nature of the services rendered by the facility.¹ It acknowledged a major difference in the level of care offered in ICFs. App. E, pp. 17e-18e, 22e-23e.² The Second Circuit court expressly rejected the Eighth Circuit court's reasoning (App. A, p. 6a n.4) and accepted the arguments of DHHS that any custodial facility participating in the Medicaid program could be an IMD based upon the diagnoses of the patients and without regard to the nature of the services provided by the facility.

¹ Both the District Court in this case (App. C, pp. 20c-21c) and the District Court in Illinois in an identical case (App. F, p. 3f) adopted a similar interpretation of the statute.

² Respondents seek to attribute to the Eighth Circuit court the statement that "IMD treatment may include the type of care provided by facilities that offer only ICF services," relying on the Court's reference to "room and board" care not aimed at providing "active or therapeutic treatment leading to cure." Br. in Opp., p. 10. This reflects a misunderstanding of the court's analysis. The court meant, in the cited passage, that a facility would be classified as an IMD if its residents required the intensive level of psychiatric or custodial care characteristic of mental hospitals, whether or not the facility actually met the needs of its patients. App. E, p. 23e; 718 F.2d at 866. This meaning is confirmed by the court's cross reference to an earlier portion of its opinion (App. E, pp. 18e-20e; see 718 F.2d at 863-64) and to *Connecticut v. Schweiker*, 557 F.Supp. at 1084-85 (App. C, pp. 12c-15c) and *Woe v. Matthews*, 408 F.Supp. 419, 422, 426-29 and note 23. See App. E, p. 23e. This meaning insures that an IMD cannot become eligible for federal Medicaid funding by *not* meeting the needs of its patients.

The differentiation in level or intensity of care of mentally ill patients, to which the Second Circuit court attached no significance, is critical to the overall statutory scheme for providing federal assistance to the needy mentally ill. A major purpose of the original Medicaid Act in 1965 was to encourage the development of less intensive settings for mentally ill people who did not require the strict regimen of a mental hospital. Pet., p. 5. The IMD provision, which served to restrict the availability of federal Medicaid funds for care in mental hospitals, was an important element of that scheme, for it fortified the express statutory aim of encouraging states to develop alternative care settings, such as nursing homes. See 42 U.S.C. § 1396a(a)(20). Facilities like Middletown Haven emerged in response to that federal inducement, and the effort now to recoup the Medicaid funds that were paid for services provided in that facility and others like it breaks faith with the overriding Congressional plan.³

Respondents' failure to appreciate the conflict in the circuit court decisions is reflected in the incorrect statement that Middletown Haven, the Connecticut facility in issue in this case, "would qualify as an IMD under the Eighth Circuit court's test." Br. in Opp., p. 11 n.2. Respondents base this statement on the characteristics of Middletown Haven itemized at page 6 of their Brief in Opposition. Yet the three facilities involved in the Eighth Circuit case exhibited comparable characteristics, and on the all-important criterion of percentage of patients diagnosed as mentally ill all three had a higher percentage of such patients than did Middletown Haven. Compare Br. in Opp., p. 6 with App. D, pp. 49d-51d. It cannot be doubted that Middletown Haven would not have been found to be an IMD under the Eighth Circuit court's decision.

³ It should be stressed that a lower level or intensity of care does not imply a reduced quality of care. Nursing home care of the mentally ill who do not require mental hospital treatment was regarded as a better response to patient needs. In this connection, it is significant that Middletown Haven was described by the responsible DHHS official on the audit review team as an "excellent facility" and an "ideal ICF." Jt. App. 76.

The conflict among the federal courts regarding the correct interpretation of the IMD exclusion from Medicaid is manifest and important. Whether or not federal Medicaid funds are available to help care for a needy nursing home patient with a diagnosis which includes some sort of mental illness should not depend upon the geographical location of the facility.

For the foregoing reasons and the reasons stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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